



225564

ATTORNEYS AT LAW  
CANAL SQUARE 1054 THIRTY-FIRST STREET, NW WASHINGTON, DC 20007  
TELEPHONE: 202.342.5200 FACSIMILE: 202.342.5219

RICHARD BAR  
BRENDAN COLLINS  
STEVEN JOHN FELLMAN  
EDWARD D. GREENBERG  
KATHARINE FOSTER MEYER  
DAVID K. MONROE  
TROY A. ROLF  
DAVID P. STREET  
KEITH G. SWIRSKY  
THOMAS W. WILCOX

BRIAN J. HEISMAN  
KARA KRAMAN\*  
JASON M. SETTY\*  
DAVID G. SHANNON

DEREK A. BLOOM\*  
ROBERT N. KHARASCH\*  
JOHN CRAIG WELLER\*

MINNESOTA OFFICE  
700 TWELVE OAKS CENTER DRIVE, SUITE 700  
WAYZATA, MN 55391  
TELEPHONE: 952.449.8817 FACSIMILE 952.449.0614

WRITER'S DIRECT E-MAIL ADDRESS  
TWILCOX@GKGLAW.COM

WRITER'S DIRECT DIAL NUMBER  
202.342.5248

\*NOT ADMITTED IN DC  
OF COUNSEL

August 20, 2009

**VIA E-FILING**

The Honorable Anne K. Quinlan  
Acting Secretary  
Surface Transportation Board  
395 E Street, SW  
Washington, DC 20423

**Re: STB Docket NOR 42111, *Oklahoma Gas & Electric Company*  
*v. Union Pacific Railroad Company***

Dear Ms. Quinlan:

Attached for filing via e-filing in the above-captioned case please find the Reply of Oklahoma Gas & Electric Company to the Petition for Clarification filed by Union Pacific Railroad Company in this docket on August 13, 2009.

Please contact the undersigned with any questions.

Sincerely,

Thomas W. Wilcox  
*Attorney for Oklahoma Gas & Electric Company*

**Attachment**

cc: Michael L. Rosenthal, Esq. (counsel for Defendant)  
Patrick D. Shore, Esq.  
Allen F. Gould

OKLAHOMA GAS & ELECTRIC COMPANY	)	
	)	
Complainant,	)	
	)	
v.	)	Docket NOR 42111
	)	
UNION PACIFIC RAILROAD COMPANY	)	
	)	
Defendant.	)	
	)	

**Complainant Oklahoma Gas & Electric Company (“OG&E”) hereby replies to the Petition for Clarification (“Petition”) filed by Defendant Union Pacific Railroad Company (“UP”) in this proceeding on August 13, 2009.**

UP's Petition seeks clarification of several aspects of the decision served in this proceeding on July 24, 2009 ("Decision"), wherein the Board confirmed that the common carrier rates established by UP for the transportation of coal from the Powder River Basin in Wyoming ("PRB") to OG&E's Muskogee Generating Station ("Muskogee") are unreasonable. In the Decision the Board calculated the maximum reasonable rates for the first and second quarters of 2009 ("1Q09" and "2Q09") subject to adjustment of the 2Q09 rates for reparations purposes using actual operating characteristics of OG&E's

traffic. Decision at 2. UP was ordered to establish new maximum reasonable rates in accordance with the Decision and to pay reparations for overcharges between January 1, 2009 and the date the new rates are established. Id. at 11. While OG&E agrees with UP that certain aspects of the Decision require clarification, OG&E does not agree with some aspects of the Petition, and the Petition is silent on two significant aspects of the Decision: (1) the establishment of maximum reasonable rates for the third quarter of 2009 ("3Q09"); and (2) OG&E's quarterly verification process. OG&E's specific points in response to the Petition are discussed below.

**B. Points Not Raised in UP's Petition**

**1. The Establishment of Maximum Reasonable Rates for 3Q09**

As stated above, in the Decision the Board calculated maximum reasonable rates for 1Q09 and 2Q09. Id. at 8.; Appendices B and C. However, the Board also stated that, for "all subsequent quarters" after 1Q09, "the parties should utilize the latest available Uniform Railroad Costing System (URCS) application with the actual operating characteristics of OG&E's traffic, and index those URCS data to the appropriate quarter." Id. at 2. Accordingly, the amount OG&E was overcharged for rail service to Muskogee during 1Q09 can be calculated based on Appendix B to the Decision. The amount OG&E was overcharged for rail service during 2Q09 can be calculated using freight bill and payment data and actual operating statistics for 2Q09, combined with the appropriate URCS data and indices as directed by the Decision. OG&E has performed those calculations and on August 19, 2009 submitted a Statement of Reparations owed for 1Q09 and 2Q09 to UP and a request for payment pursuant to 49 C.F.R. §§1133.2 and 1141.

However, UP has yet to establish rates for 3Q09, and its Petition is silent on what those rate levels will be, as it addresses only the calculation of rates for the fourth quarter of 2009 and beyond. See, e.g., Petition at 2. OG&E submits that the Board should clarify that under the procedures outlined in the Decision, the 3Q09 rates could have been established no later than July 24, 2009, and should be established by UP at the same levels of the 2Q09 rates. This is because (1) the most recent Association of American Railroads ("AAR") RCR index and the Bureau of Labor Statistics ("BLS") Producer Price Index ("PPI") indices identified by the Board to index the most recent URCS data to 3Q09 became available on June 30, 2009 and July 14, 2009, respectively, and (2) the operating parameters used to establish 3Q09 rates by necessity are the 2Q09 actual operating parameters, which are known and were used by OG&E to calculate the 2Q09 rates. Under the procedures outlined by the Board, once the AAR and PPI indices become available, UP has ten (10) days to calculate the maximum lawful rate, which, applied to 3Q09 rates means that such rates could have been established on or after July 24.

## **2. Quarterly Verification Process**

Neither the Board's Decision nor UP's Petition address the issue of allowing OG&E an opportunity to verify UP's quarterly rate calculations. The Board should therefore clarify the Decision to describe a mechanism or process whereby OG&E would receive the quarterly rate calculations from UP, verify UP's quarterly calculations and resolve any disagreements.

**C. The Points Raised in UP's Petition**

OG&E addresses the clarification points raised by UP in the Petition in order, for the Board's convenience.

**1. Clarification of the Appropriate AAR and PPI Indexes**

UP asks the Board to clarify the Decision to state that the appropriate AAR and PPI indices to use are the versions that are available by the first few weeks of the quarter for which new rates are being calculated. OG&E believes the Decision needs no clarification on this issue. Specifically, the Board dated, "[a]t the end of the quarter, UP is instructed to wait until the AAR and PPI indices become available, normally two weeks." Decision at 11, note 16.

**2. Clarification of the Appropriate Date to Begin Charging New Rates**

OG&E agrees with UP that the Board should clarify the Decision to state the Board did not intend for rates established for a particular quarter under the procedures outlined in the Decision to be applied retroactively to the start of the quarter.

**3. Clarification of the Appropriate Operating Characteristics**

OG&E does not agree with UP that the Board, by stating UP should combine indexed URCS data "with the actual operating characteristics," *Id.* at 11, intended for UP to perform quarterly rate calculations based on a rolling average of the actual operating characteristics of trains moving in the twelve-month period preceding the start of the quarter in question. Petition at 5. However, OG&E concurs with UP that this aspect of the Decision requires clarification, and submits that it is more logical and consistent with the remainder of the Decision for quarterly rate calculations to be made based on the actual operating characteristics of the prior quarter. Use of such data is more consistent

with the indexing procedures outlined by the Board for the following reasons: First, the actual operating characteristics for a particular quarter are known to UP immediately after the end of the quarter and can be easily supplied to OG&E, making this component of the rate calculation available before the applicable AAR and PPI indices are subsequently published. In fact, OG&E submits that the Board should consider further clarifying the procedures set out in the Decision to require UP to provide the actual operating characteristic data for the prior quarter to OG&E within five (5) days of the end of the quarter. The parties will then have an opportunity to ensure there are no disagreements over operating characteristics while they await the publication of the PPI index later in the first month of the quarter and UP applies it and the AAR index to the URCS data and operating characteristics to calculate the new quarterly rate.

**4. Appropriate Characteristics in the Absence of Recent Operating Data**

Consistent with the foregoing, OG&E submits that the Decision should be clarified to state that, for any origin, if no movements occurred in the prior quarter, then the new maximum reasonable rates should be calculated based on the average tons per car and cars per train of all other traffic that had moved under the prescribed rates in the prior quarter to Muskogee, but using actual miles for the particular origin. Decision at 6, Table 2. OG&E therefore disagrees with UP that annual data should be used for this calculation.

**D. Conclusion**

In conclusion, for the reasons set forth above in this Reply, OG&E agrees with UP that the Decision should be clarified by the Board to ensure that UP establishes maximum reasonable rail rates for the transportation of PRB coal to the Muskogee

Station consistent with the Board's intent. However, OG&E does not entirely agree with the points raised in the Petition, and believes there are additional points the Board should clarify to ensure its intentions are fully conveyed and implemented.

Respectfully submitted,

A handwritten signature in black ink that reads "Thomas W. Wilcox". The signature is written in a cursive style with a large, stylized 'T' and 'W'.

Thomas W. Wilcox  
Jason M. Setty  
GKG Law, P.C.  
1054 Thirty-First Street, NW, Suite 200  
Washington, DC 20007  
Phone: 202.342.5248  
Fax: 202.342.5222

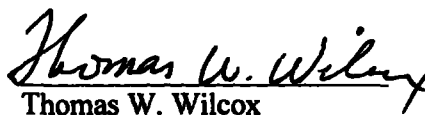
*Attorneys for Oklahoma Gas & Electric  
Company*

Dated: August 20, 2009

**CERTIFICATE OF SERVICE**

I do hereby certify that I have delivered a true and correct copy of the foregoing  
Reply to Petition for Clarification to the following addressee at the address stated by e-mail,  
and by depositing same in the United States mail, first class postage prepaid, this 20th day of  
August, 2009:

Michael L. Rosenthal, Esq.  
Covington & Burlington LLP  
1201 Pennsylvania Avenue, N.W.  
Washington, DC 20004

  
Thomas W. Wilcox